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No. 91-1135

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

NEWARK MORNING LEDGER CO.,
as successor to The Herald Company,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT OF INTEREST

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION (ANPA) is a non-profit trade association representing approximately 1,300 member newspapers. Its membership includes the publishers of newspapers that are responsible for about 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation, in the United States.

ANPA submits this brief *amicus curiae* in support of the petition for a writ of certiorari.* The issue at the heart of this case will directly affect ANPA members that have negotiated transactions in reliance on the heretofore settled rule that the availability of an amortization deduction for purchased intangible assets is a factual question. If the Third Circuit's opinion is allowed to stand, similarly situated ANPA members will be taxed differently, both at the administrative level and by the courts, depending on whether they happen to be subject to the jurisdiction of the Third Circuit.

SUMMARY OF ARGUMENT

The Third Circuit's decision has created a split in the circuits that will result in non-uniform treatment of similarly situated ANPA members. Under the law as it now stands, ANPA members outside the Third Circuit's jurisdiction have the right to prove, as a factual matter, that the amount paid for purchased newspaper subscribers is amortizable. Those members within the Third Circuit's jurisdiction do not.

Moreover, the issue before the Court of Appeals—the amortizability of customer relationships—is one that has been repeatedly considered by courts in the past, and will continue to arise in the future. Given (a) the issue's long history, (b) the expectation that ANPA members will continue to claim that purchased newspaper subscribers are subject to amortization, and (c) the Internal Revenue Service's stated position that such assets are nonamortizable as a matter of law, taxpayers and the Service will continue to litigate the eligibility of newspaper subscribers for amortization until this Court resolves the issue.

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* Written consents of both parties have been filed with the Clerk of the Court as required by Supreme Court Rule 37.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A SPLIT IN THE CIRCUITS, CAUSING TAXPAYERS TO BE TREATED DIFFERENTLY DEPENDING ON THE CIRCUIT IN WHICH THEY HAPPEN TO RESIDE.

The Court of Appeals for the Third Circuit ruled in the instant case that the value of terminable-at-will customer relationships is, *as a matter of law*, nonamortizable goodwill for federal income tax purposes. This ruling is plainly inconsistent with the decision of the Court of Appeals for the Seventh Circuit in *Donrey, Inc. v. United States*, 809 F.2d 534 (8th Cir. 1987), a case that is factually indistinguishable from the instant case. Indeed, the Third Circuit itself admitted that *Donrey* "is undeniably similar to the instant dispute in terms of the material aspects of the transaction." (App. 18a.)

Both *Donrey* and the instant case involved the tax treatment of purchased newspaper subscribers. In both cases, the taxpayer acquired the subscribers when it purchased an ongoing newspaper. In both cases, the taxpayer valued the subscribers using the income approach. Although the taxpayer in *Donrey* was allowed to prove (and did prove) the amortizability of the subscribers as a factual matter, the taxpayer in the instant case was denied that opportunity by the Third Circuit. Therefore, there is a clear split between the Third and Eighth Circuits.

The split among the Courts of Appeal is not limited to the split between *Donrey* and the instant case. For example, the Court of Appeals for the Eleventh Circuit in *Citizens & Southern Corp. v. Commissioner*, 919 F.2d 1492 (11th Cir. 1990), *aff'g*, 91 T.C. 463 (1988), affirmed the holding of the Tax Court that the "core deposits" of a bank are amortizable for federal income tax purposes. Core depositors of a bank are analogous to subscribers of a newspaper. In both cases, the busi-

ness uses a relationship—with the subscriber in the case of a newspaper and with the core depositor in the case of a bank—to generate earnings from the other customers of the business: the advertisers in the case of a newspaper, the borrowers in the case of a bank. In neither case is there a contractual arrangement that ensures the continued patronage of the subscribers or depositors. In both cases, the businesses know that their subscribers or depositors will remain for determinable periods of time. Therefore, both situations involve terminable-at-will relationships with determinable lives that enable the business to generate earnings from its other customers.

The Third Circuit agreed that there is no principled distinction between the factual situation in the instant case and that in *Citizens & Southern*. It stated:

> We could attempt to distinguish *Colorado National* [*Colorado National Bankshares, Inc. v. Commissioner*, 60 T.C.M. (CCH) 771 (1990)] and *Citizens & Southern* from the instant dispute. We believe, however, that such an exercise ultimately would prove pointless and would be somewhat disingenuous.

App. 23a. Despite the acknowledged similarity between *Citizens & Southern* and the instant case, the two taxpayers involved were treated differently. The taxpayer in *Citizens & Southern* was allowed to demonstrate the facts necessary to amortize the value of the terminable-at-will customer relationships. The Third Circuit denied this opportunity to the taxpayer in the instant case. Therefore, there is also a clear split between the Third and Eleventh Circuits.

The petition for certiorari discusses other cases that conflict with the decision of the Third Circuit in the instant case. There can be no question, then, that the Third Circuit's decision is unique, and inconsistent with the rules in several other circuits.

The resulting split in the circuits is of great practical concern to the members of ANPA, and suggests the need

for this Court to address the issues raised. Many ANPA members have in the past acquired other newspapers, and many will acquire newspapers in the future. For example, information published in *Editor & Publisher*, a magazine serving the newspaper business, shows that from 1985 through the end of 1991, approximately 370 daily newspapers were acquired, or an average of more than fifty per year. *Editor & Publisher*, January 4, 1986, pp. 46-49; January 3, 1987, pp. 52-56; January 2, 1988, pp. 46-48; January 7, 1989, pp. 48-52; January 6, 1990, pp. 60-64; January 5, 1991, pp. 50-53; January 4, 1992, pp. 44-46. Not all of these acquisitions were of or by ANPA members, and not all of them resulted in the acquirer claiming amortization deductions for purchased subscribers. Nevertheless, ANPA is aware that in at least the larger acquisitions, purchasers took the position that a portion of the purchase price was properly attributable to the subscribers and claimed amortization deductions for the amount attributable to those subscribers. Those newspaper purchasers not subject to the jurisdiction of the Third Circuit have the right to prove, as a factual matter, that the purchased subscribers are eligible for amortization. Those newspaper purchasers subject to the jurisdiction of the Third Circuit have no such right. The result is that our tax system treats ANPA members differently, depending on the circuit that has jurisdiction over their tax disputes. ANPA submits that this Court should address this inherent unfairness by resolving the conflict among the circuits.

The discriminatory impact on ANPA members arises not only in the event of an audit by the Internal Revenue Service (the "Service") of a past transaction. It will also arise in the future as ANPA members contemplate purchasing other newspapers. A potential purchaser that is not subject to the jurisdiction of the Third Circuit can offer a price for a newspaper that is higher than could be offered by a potential purchaser within the Third Circuit, simply because the former can assume it

will pay less tax on the newspaper's operations by virtue of amortization deductions. (The availability of amortization will generally depend on the location of the *purchaser*, and not the location of the newspaper being purchased.) Therefore, the effect of the Third Circuit's opinion is to artificially tilt the playing field in favor of non-Third Circuit newspaper purchasers, thus leading to economic inefficiency.

The impact of the Third Circuit's decision goes far beyond the newspaper industry, because other industries —such as the banking industry—have analogous intangible assets. Thus, the split in the circuits will result in similarly situated non-newspaper companies being taxed differently, depending on whether or not they are located in the Third Circuit.

II. THE ISSUE ADDRESSED IN THIS CASE IS ONE THAT WILL CONTINUE TO BE LITIGATED UNLESS THIS COURT RESOLVES IT.

The issue addressed by the Third Circuit—the amortizability of terminable-at-will customer relationships—is one that has recurred over a long period. ANPA members will continue to purchase newspapers, and will continue to take the position that the portion of the purchase price attributable to purchased subscribers is amortizable.

ANPA also expects that the Service will routinely disallow amortization deductions at the audit stage, and perhaps within the Appeals Office of the Service as well. The Service has initiated an "Industry Specialization Program" for selected industries, including the media industry, with an "industry specialist" for each selected industry. See Internal Revenue Manual ("IRM")—Audit, Chapter 900, "Industry Specialization", and Part 42(14), "Industry Specialization Program". As part of that program, the Service identifies tax issues relating to a particular industry and develops a position paper on

each identified issue. IRM 42(11)8, Section 952(3). After the Service's National Office Examination Function approves an issue, it becomes an official "coordinated issue" for the industry. IRM 42(11)8, Section 952(9).

Pursuant to IRM 42(14)5.1(1), an agent auditing a return may not adopt a position contrary to that reflected in a coordinated issue without the specific concurrence of the industry specialist. See also IRM 42(14)5.21(f) and IRM 42(14)5.22(d) (both district case managers and group managers are required to follow decisions on coordinated issues formulated by the industry specialist, unless a deviation is approved by the industry specialist and the national industry coordinator). Thus, the Service is attempting to make uniform its treatment of taxpayers in certain industries, including the media industry.

Pursuant to the industry specialization program for the media industry, the Service adopted an "ISP Coordinated Issue Paper" on customer based intangibles. That coordinated issue paper states in part that

> . . . if the customer based intangible represents the customer structures of the acquired business, and that business possesses characteristics of goodwill, then the intangible is inseparable from goodwill, and thus, is nonamortizable *as a matter of law*.

ISP Coordinated Issue Paper, Customer Based Intangibles, page 3 (undated; emphasis added). The coordinated issue paper confirms that the Service's position is that the asset at issue in this case is nonamortizable as a matter of law; moreover, as described above the Service has put in place procedures to enforce that position on audit.

Thus, while taxpayers will continue to claim amortization deductions for assets like newspaper subscribers, the Service has taken the institutional position that those assets are not amortizable as a matter of law. The question of the eligibility of those assets for amortization will

therefore recur in the courts until this Court resolves the split among the circuits.

CONCLUSION

Without review by this Court, similarly situated ANPA members will receive differing tax treatment, whether they are the subject of an audit for a past newspaper acquisition or contemplating purchasing newspapers in the future. Without guidance from this Court, the issue of the amortizability of terminable-at-will customer relationships is destined to be litigated by taxpapers and the Service for the foreseeable future.

For the foregoing reasons, ANPA submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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